DIVISION ONE
FILED: 06/29/10
PHILIP G. URRY, CLERK
BY: JT

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

THE CARIOCA COMPANY, an Arizona corporation, Plaintiff/Appellant, v. RACHELE SULT dba GRANITE MOUNTAIN MATERIALS, an Arizona business, Defendant/Appellee.	1 CA-CV 09-0659 DEPARTMENT T **MEMORANDUM DECISION** (Not for Publication – Rule 28, ARCAP)

Appeal from the Superior Court in Yavapai County

Cause No. P1300CV20070835

The Honorable Howard D. Hinson, Jr., Judge

AFFIRMED

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W I N T H R O P, Judge

¶1 The Carioca Company appeals the Yavapai County Superior Court's grant of summary judgment and award of attorneys' fees to Rachele Sult, sole proprietor of Granite Mountain Materials. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY[1]

¶2 The Carioca Company ("Carioca") owns property in Prescott, Arizona (the "Property"), part of which the previous owners had operated as a gas station. In the fall of 2004, Carioca contracted with Danu Construction Company ("Danu") to construct a convenience store and carwash on the Property. Danu was in the process of digging ditches for water lines when this action arose.

¶3 Rachele Sult ("Sult") is the sole proprietor of Granite Mountain Materials ("Granite Mountain"), a business that specializes in hauling building and landscape material. On October 7, 2004, Sult received a telephone call from a Danu employee requesting that Granite Mountain "[h]aul off dirt" from the Property. According to Sult, when she asked the caller about the type of dirt, the caller told her that it was "pretty clean." Sult had two customers in need of dirt, so she accepted the job and "sent a driver and a dump truck" to the Property.

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[1] In reviewing a grant of a motion for summary judgment, we construe the facts and reasonable inferences in the light most favorable to the opposing party. *Wells Fargo Bank v. Ariz. Laborers, Teamsters Cement Masons Local No. 395 Pension Trust Fund*, 201 Ariz. 474, 482, ¶ 13, 38 P.3d 12, 20 (2002).

The first driver arrived at the Property with a large truck and instructions to haul a load of dirt to a residence on High Street (the "High Street residence"). Sult then sent a second driver and a smaller truck to the Property with instructions to haul several loads of dirt to an unoccupied residence on Clearwater Street (the "Clearwater residence").[2]

¶4 As the dirt was being loaded into the first driver's truck, the driver noticed an oil smell. He mentioned the smell to Danu's backhoe operator, was told the dirt "wasn't bad," and delivered the dirt to the High Street residence. The second driver, who was delivering loads of dirt to the Clearwater residence, also noticed a "strong odor" coming from the dirt he delivered and contacted Sult.

¶5 In the meantime, the High Street customer called Sult to complain that the dirt Granite Mountain delivered to her home "smelled like petroleum, [like] gas." The customer also contacted the Arizona Department of Environmental Quality ("ADEQ") to report the tainted dirt. Sult "stopped the job" and visited the High Street residence to "examine[] the material." Upon inspection, she discovered dirt that she "wouldn't have wanted" in her own garden - "it smelled highly of gasoline." Sult had her drivers remove the dirt from High Street,

[2] A receipt dated the same day – October 7 – shows that Sult charged Danu $294 for the entire job.

consolidate it at the unoccupied Clearwater residence, and then waited to hear from ADEQ.

¶6 The next day, October 8, 2004, an ADEQ representative contacted Sult regarding its investigation of what turned out to be petroleum contaminated soil ("PCS"). ADEQ later issued a notice of violation to both Carioca and Granite Mountain, but did not pursue sanctions against Sult or Granite Mountain. Danu moved the soil to a vacant Carioca property in Cordes Junction, Arizona, and Carioca ultimately entered a consent judgment with ADEQ, agreeing to pay an $80,000 civil penalty for violations arising out of the excavation and disposal of "special waste-petroleum contaminated soil."

¶7 On August 3, 2007, Carioca filed a complaint against Granite Mountain for breach of contract and negligence, seeking recovery of the civil penalty it paid to ADEQ. In turn, Sult moved for summary judgment on both claims, arguing (1) that there was no contract between Sult and Danu regarding the removal of PCS pursuant to Arizona law, and thus Carioca could not be a third party beneficiary of such a contract; and (2) that the economic loss rule bars the negligence claim because Carioca failed to allege damage to property or personal injury. The superior court granted Sult's motion on all counts.

¶8 Carioca unsuccessfully moved for reconsideration of the superior court's ruling, and the trial court issued its

final judgment and awarded Sult her attorneys' fees. Carioca timely appealed, and we have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") section 12-2101(B) (2003).

ANALYSIS

¶9 When reviewing the superior court's grant of summary judgment, we apply a *de novo* standard of review. *State Comp. Fund v. Yellow Cab Co. of Phoenix*, 197 Ariz. 120, 122, ¶ 5, 3 P.3d 1040, 1042 (App. 1999). We will affirm if the evidence produced in support of the claim has "so little probative value, given the quantum of evidence required, that reasonable people could not agree with the conclusion advanced by the proponent of the claim or defense." *Orme School v. Reeves*, 166 Ariz. 301, 309, 802 P.2d 1000, 1008 (1990).

1. Contract Claim

¶10 Carioca argues that the superior court erred when it granted summary judgment in favor of Sult because the facts available "would permit a reasonable fact finder to conclude that, even if Granite Mountain did not initially agree to remove contaminated soil from the Property, the conduct of its agent and employee, [the first driver], was sufficient to modify the contract to one for removal of contaminated soil from the Property." We disagree.

¶11 Before the superior court, Carioca bore the burden of proving the existence of a contract, breach, and the resulting

damages. *Alexander v. O'Neil*, 77 Ariz. 91, 98, 267 P.2d 730, 734 (1954). Unable to locate the former Danu employee purported to have arranged the soil haul, Carioca failed to provide the court with any evidence to counter Sult's deposition testimony that she only agreed to haul away "clean" soil. Without evidence to contradict Sult's assertion, Carioca was left to prove that the parties agreed to a modification of the original agreement for Granite Mountain's hauling services. Again, it failed to do so.

¶12 Generally, "a person is under no legal obligation to perform a gratuitous promise and a new agreement supplementing or modifying an executory contract is . . . an independent contract requiring for its validity all the elements of a contract, including a proper consideration." *Perry v. Farmer*, 47 Ariz. 185, 188, 54 P.2d 999, 1001 (1936). Thus, if the original agreement between Danu and Sult for the removal of clean soil was in fact a contract, as Carioca contends, a modification of that contract required consideration. Merely performing the duty a party was already bound to perform, however, does not qualify as "consideration" for contract modification purposes. *Id.* Here, Carioca alleges the driver's act of hauling the suspicious soil was sufficient to modify the proposed contract. We disagree because (1) there was no

consideration for the alleged modification, and (2) even if there was, there was no mutual assent.

¶13 Sult's driver did not agree to haul PCS. In fact, he expressed concern to Danu's backhoe operator, saying that if he was being asked to haul contaminated soil such that "it was going to be bad, that [Danu] would have to do something about it," because Granite Mountain "[was not] going to haul it."

¶14 Further, certain uncontested facts strongly support Sult's contention that she agreed to haul "clean" dirt, not to dispose of PCS: (1) Sult had no experience in the hazardous waste business, nor did the drivers assigned to the Danu job; and (2) Sult charged Danu a mere $294 for the entire job. Although neither party provided evidence of the costs involved, proper disposal of PCS falls within a statutory and regulatory framework that makes it an expensive undertaking. *See* A.R.S. § 49-241(B)(2) (2005) (requirement of aquifer protection permit for operation of solid waste disposal facility); A.R.S. § 49-241.02 (2005) (maximum payment for aquifer protection permit fees); Ariz. Admin. Code ("A.A.C.") R18-13-1604 (waste determination required for excavated soil contaminated with petroleum); A.A.C. R18-13-1612 (store PCS less than ninety days prior to shipment to storage, disposal, or treatment facility); A.A.C. R18-13-1613 (dispose of special waste at registered storage, disposal, or treatment facility permitted by ADEQ).

See also A.A.C. R18-13-1302 (obtain special waste generator identification number); A.A.C. R18-13-1303 (use registered special waste shipper); Ariz. Dep't of Envtl. Quality, Fact Sheet: Petroleum Contaminated Soil (PCS) FS 08-14 (July 2008), *available at* http://www.azdeq.gov/environ/waste/solid/download/pcs_july08fact.pdf (last visited June 16, 2010); James L. Richey, *Regulation of Underground Storage Tanks*, 25 Real Prop. Prob. & Tr. J. 311, 318-19 (1990). We doubt that a party familiar with proper waste determination and classification, permits, costs, and disposal techniques would charge the rate that Sult charged to remove the dirt, especially considering the potentially stiff penalties associated with improper disposal. *See* A.R.S. §§ 49-262 (2005) and 49-861 (2005). Carioca has provided no evidence to contradict these facts and the resulting inferences. Without additional evidence, no reasonable fact finder could conclude that the actions of Sult's first driver were sufficient to modify the agreement between Danu and Sult to remove contaminated soil.

¶15 Accordingly, we affirm the superior court's ruling with respect to Carioca's contract claim.

2. Negligence Claim and the Economic Loss Doctrine

¶16 Next, Carioca argues that the superior court erred in granting summary judgment in favor of Sult because Arizona courts "have not applied the economic loss rule to cases other

than those involving product liability or construction defect[s]," and this case falls within neither category. Again, we disagree. "The economic loss doctrine may vary in its application depending on context-specific policy considerations." *Flagstaff Affordable Housing Ltd. P'ship v. Design Alliance, Inc.*, 223 Ariz. 320, 325, ¶ 24, 223 P.3d 664, 669 (2010). Further, while *Flagstaff* addressed a situation involving a construction defect, its analysis referred to "construction-related contracts," generally. *Id.* at ¶ 25. In the present case, Carioca argues the agreement between the parties was a contract.[3] If, indeed, it was, then the policy reasons expounded in *Flagstaff* for applying the economic loss rule to construction defect cases certainly seem to apply to this case, where a contractor at a construction site hires another party to remove a byproduct of that construction.

¶17 The economic loss doctrine bars plaintiffs, in certain circumstances, from recovering economic damages in tort unless accompanied by physical harm, either in the form of personal injury or property damage. *Flagstaff Affordable Housing*, 223

[3] To apply the economic loss rule, we need not decide whether Carioca has a viable contract claim against Sult. *See Carstens v. City of Phoenix*, 206 Ariz. 123, 127, ¶ 17, 75 P.3d 1081, 1085 ("Arizona courts have never held that the application of the economic loss rule depends upon the plaintiff also having a viable contract claim against the defendant".), *overturned on other grounds by Flagstaff Affordable Housing*, 223 Ariz. at 320, 223 P.3d at 664.

Ariz. at 321, ¶ 1, 223 P.3d at 665. Specifically, "[e]conomic loss . . . refers to pecuniary or commercial damage . . . for a product or property that is itself the subject of a contract between the plaintiff and defendant." *Id.* at 323, 223 P.3d at 667 (citation omitted). "The rule stems from the principle that contract law and tort law each protect distinct interests. Generally, contract law enforces the expectancy interests between contracting parties and provides redress for parties who fail to receive the benefit of their bargain." *Carstens*, 206 Ariz. at 126, ¶ 10, 75 P.3d at 1084 (citing *Recovery of Economic Loss in Tort for Construction Defects: A Critical Analysis*, 40 S.C. L. Rev. 891, 895-96 (1989)), *overturned on other grounds by Flagstaff Affordable Housing*, 223 Ariz. at 320, 223 P.3d at 664. Further, in the construction defect context,

> allowing tort claims poses a greater danger of undermining the policy concerns of contract law. The law seeks to encourage parties to order their prospective relationships, including the allocation of risk of future losses and the identification of remedies, and to enforce any resulting agreement consistent with the parties' expectations.

Flagstaff Affordable Housing, 223 Ariz. at 325, ¶ 25, 223 P.3d at 669. Although the economic loss doctrine is not "a 'blanket disallowance of tort recovery for economic losses[,]' . . . recovery is barred when the claim alleges 'only economic damages resulting from an alleged breach of contract.'" *Ares Funding,*

L.L.C. v. MA Maricopa, L.L.C., 602 F. Supp. 2d 1144, 1148 (D. Ariz. 2009) (citations omitted).

¶18 Here, Carioca argues that it suffered economic damage, in the form of a civil penalty, as the result of Sult and Granite Mountain's alleged breach of an agreement to move PCS. This argument falls squarely within the bounds of the economic loss rule as described above, and particularly within the policy rationale behind the rule. *See id.*

¶19 As noted above, contract law principles "encourage parties to order their prospective relationships" by allocating future losses, while also encouraging enforcement of the expectancy interests of the contracting parties. *Flagstaff Affordable Housing,* 223 Ariz. at 325, ¶ 25, 223 P.3d at 669. The Restatement (Second) of Contracts, addresses limitations on damages arising out of contract, and discusses party expectations. Specifically,

> There are unusual instances in which it appears from the circumstances either that the parties assumed that one of them would not bear the risk of a particular loss or that, although there was no such assumption, it would be unjust to put the risk on that party. One such circumstance is an extreme disproportion between the loss and the price charged by the party whose liability for that loss is in question. The fact that the price is relatively small suggests that it was not intended to cover the risk of such liability. Another such circumstance is an informality of dealing, including the absence of a detailed written contract, which indicates that there was no careful attempt to allocate all of the risks. The fact that the parties did not attempt to delineate with precision all of the

> risks justifies a court in attempting to allocate them fairly.

Restatement (Second) of Contracts § 351, cmt. f (1981). This case presents one such instance – the price Sult charged, $294, is clearly disproportionate to the task Carioca alleges Granite Mountain agreed to perform, and unquestionably the parties' agreement was informal. Sult, a landscape and building materials hauler, received a call from a Danu representative to simply move dirt. There was no written agreement allocating any risk involved with hauling highly regulated contaminated soil. Allowing tort damages in a case such as this would only further undermine the policy concerns of contract law. Given these considerations, we affirm the superior court's ruling on Carioca's negligence claim and conclude that Carioca is limited to its contractual remedies for purely economic loss.

3. Attorneys' Fee Award

¶20 Finally, Carioca disputes the superior court's award of Sult's attorneys' fees. Attorneys' fees may be awarded only when provided for by agreement or statute. *Chavarria v. State Farm Mut. Auto. Ins. Co.*, 165 Ariz. 334, 337, 798 P.2d 1343, 1346 (App. 1990). Pursuant to A.R.S. § 12-341.01(A) (2003), a court may award reasonable attorneys' fees in "any contested action arising out of a contract." We review an attorneys' fee award under A.R.S. § 12-341.01(A) for an abuse of discretion.

Orfaly v. Tucson Symphony Soc'y, 209 Ariz. 260, 265, ¶ 18, 99 P.3d 1030, 1035 (App. 2004).

¶21 The Arizona Supreme Court has listed factors for the superior court to consider when deciding whether to award attorneys' fees. *See Associated Indem. Corp. v. Warner*, 143 Ariz. 567, 570, 694 P.2d 1181, 1184 (1985). Among the factors are (1) whether the unsuccessful party's claim or defense had merit; and (2) whether the litigation could have been avoided or settled. *See id.* Whether these factors are favorable to Carioca is debatable, and "even if they militate in favor of [Carioca], the court could have determined that, on balance, the other factors tipped the scales in favor of an award." *State Farm Mut. Auto. Ins. Co. v. Arrington*, 192 Ariz. 255, 261, ¶ 28, 963 P.2d 334, 340 (App. 1998). At any rate, the *Warner* factors "do not dictate our review of a trial court's decision to award fees," *Sanborn v. Brooker & Wake Prop. Mgmt., Inc.*, 178 Ariz. 425, 430, 874 P.2d 982, 987 (App. 1994), and "[w]e will not disturb the trial court's discretionary award of fees if there is any reasonable basis for it." *Orfaly*, 209 Ariz. at 265, ¶ 18, 99 P.3d at 1035.

¶22 Given the fact that Carioca lacked a witness to the formation of the purported contract and could offer no admissible evidence as to the terms of the agreement, we find

that the superior court did not abuse its discretion in awarding attorneys' fees.

CONCLUSION

¶23 For the foregoing reasons, we affirm the superior court's ruling and judgment. Further, in the exercise of our discretion, we grant Sult's request for attorneys' fees pursuant to A.R.S. § 12-341.01(A), upon compliance with Rule 21(a), ARCAP.

/S/
LAWRENCE F. WINTHROP, Judge

CONCURRING:

/S/
PATRICIA A. OROZCO, Presiding Judge

/S/
DANIEL A. BARKER, Judge